

STATE OF MICHIGAN
COURT OF APPEALS

ELITE COMMUNICATIONS, INC.,

Plaintiff-Appellant,

v

LASTAR.COM, INC., formerly known as
CABLES TO GO, INC.,

Defendant-Appellee,

and

CITY OF WYANDOTTE,

Defendant.

UNPUBLISHED

January 20, 2004

No. 241843

Wayne Circuit Court

LC No. 01-133775-CK

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant Lastar.com, Inc., under MCR 2.116 (C)(10). We affirm.

Plaintiff argues that the trial court erred in finding no genuine issue of material fact regarding the existence of an agency relationship between Eric Barger, the chief executive officer of Fibeax Constructors, Inc., a company providing cable installation services, and Lastar. The City of Wyandotte hired Lastar to install television cables, Lastar used Fibeax's services in doing so, and Fibeax, in turn, hired plaintiff to perform certain work. Despite an arbitration award entered against Fibeax and in favor of plaintiff, Fibeax apparently has not paid plaintiff for work plaintiff performed, and plaintiff is attempting to recover from Lastar the monies owed.

We review de novo a trial court's ruling with respect to a motion for summary disposition brought under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we review the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000). "The motion should be granted if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

“Where there is a disputed question of agency, any testimony, either direct or inferential, tending to establish agency creates a question of fact for the jury to determine.” *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). “An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account.” *Id.* “The test of whether an agency has been created is whether the principal has a right to control the actions of the agent.” *Id.*

“The authority of an agent to bind the principal may be either actual or apparent. Actual authority may be express or implied. Implied authority is the authority which an agent believes he possesses.” *Id.* at 698. “Apparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists,” *id.* at 698-699, and “[a]pparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent.” *Id.* at 699. “In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances.” *Id.*

We find that no agency relationship existed between Lastar and Fibeax or Barger. There is no evidence that Lastar had the actual authority to control the actions of Fibeax or Barger. The record contains no express contract to this effect, and there is no evidence leading to the conclusion that Barger believed he had the authority to act on behalf of Lastar in his and Fibeax’s dealings with plaintiff. While a letter addressed to the City of Wyandotte mentioned certain authority Fibeax had with respect to the cable installation project, this letter did not involve Fibeax’s dealings with plaintiff. Moreover, in forming the contract with plaintiff, Fibeax never mentioned Lastar or made any representations to plaintiff on behalf of Lastar. Fibeax’s agreement with plaintiff was strictly between plaintiff and Fibeax and was independent of Fibeax’s relationship with Lastar. Fibeax and its officers simply did not have actual authority, express or implied, to bind Lastar.¹

Furthermore, Fibeax and its officers did not have apparent authority to act on behalf of Lastar. As noted, apparent authority arises if acts and appearances lead a third party reasonably to believe that an agency relationship exists. *Id.* at 698-699. Nothing occurred that would lead plaintiff reasonably to believe that Fibeax was an agent of Lastar. In fact, plaintiff’s past president admitted that he did not even discover that Lastar was part of the project until the arbitration hearing involving plaintiff and Fibeax. Further, as noted above, the letter addressed to the City of Wyandotte that mentioned Barger and Fibeax did not involve plaintiff.

Plaintiff also claims that Barger was a partner of Lastar. Again, we disagree. A partnership is “a voluntary association of 2 or more persons . . . to carry on as co-owners a

¹ We note that Fibeax and Lastar entered into an ongoing service agreement in 1996; this agreement specifies that no agency relationship exists between the two. Plaintiff argues that this agreement does not apply to the instant case because it refers to the installation of computer cables, whereas the instant case involved the installation of television cables. Lastar claims that it and Fibeax were indeed operating under this agreement in the instant case. The agreement, at the very least, indicates that Fibeax and Lastar had a history of treating their relationship as one that did not involve an agency relationship.

business for profit” MCL 449.6. “In determining whether a partnership exists, the focus is not on whether individuals subjectively intended to form a partnership, that is, it is unimportant whether the parties would have labeled themselves ‘partners.’” *Byker v Mannes*, 465 Mich 637, 638-639; 641 NW2d 210 (2002). “Instead, the focus is on whether individuals intended to jointly carry on a business for profit within the meaning of the Michigan Uniform Partnership Act, MCL § 449.1 *et seq.*, regardless of whether they subjectively intended to form a partnership.” *Byker, supra* at 639. Profit sharing is prima facie evidence of a partnership that may be rebutted by showing that the payments were wages. MCL 449.7(4)(b).

There is no express agreement supporting the allegation that Barger was a partner of Lastar. Nor is there any evidence that Barger and Lastar intended to carry on together a business for profit. Fibeax had an ongoing business relationship with Lastar as a subcontractor installing computer network cables for certain accounts of Lastar. Fibeax was paid separately for each task performed. There is no indication in the Fibeax/Lastar agreement, or otherwise, that would indicate that Barger or Fibeax was a partner of Lastar. The pertinent documents signed by Barger were signed in his capacity as an officer of Fibeax and not in his individual capacity. Plaintiff has simply presented no evidence establishing that Barger and Lastar intended to carry on as co-owners a business for profit. We find no basis on which to reverse the trial court’s ruling.

Plaintiff also argues that the trial court erred in dismissing plaintiff’s unjust enrichment claim under the misconception that it lacked equitable power to grant relief. We disagree with plaintiff’s assertion that reversal is required.

The essential elements of an unjust enrichment claim are: “(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to [the] plaintiff because of the retention of the benefit by defendant.” *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). “In such instances, the law operates to imply a contract in order to prevent unjust enrichment.” *Id.* “However, a contract will be implied only if there is no express contract covering the same subject matter.” *Id.*

Here, the trial court found that plaintiff was never in privity of contract with Lastar, whether based on agency or partnership principles or otherwise, and it therefore dismissed plaintiff’s claim for equitable relief. However, there need not be an agency or partnership relationship to find that a party has been unjustly enriched. A contract may be implied in order to prevent unjust enrichment when the defendant has received a benefit from the plaintiff that is inequitable to retain. *Id.* Therefore, the trial court erred in dismissing plaintiff’s equitable claim based on the conclusion that there was no agency or partnership relationship between plaintiff and Lastar. However, as stated above, a contract will be implied only if there is no express contract covering the same subject matter. *Id.* Since there was an express contract covering the same subject matter, the contract between plaintiff and Fibeax, the trial court did not err in failing to imply a contract, albeit for the wrong reasons. An appellate court may affirm a circuit court’s order if it reaches the right result for the wrong reasons. *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 365; 663 NW2d 514 (2003). Thus, we conclude the trial court did not err in dismissing plaintiff’s unjust enrichment claim.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Richard A. Bandstra

/s/ Patrick M. Meter